No. 75-1200

In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERT E. NIMS AND LAWRENCE L. LAGARDE, SR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that the indictment improperly joined several defendants.

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners were convicted on multiple counts of an indictment charging them with interstate travel in aid of racketeering, and of illegal gambling, in violation of 18 U.S.C. 1952, 1955 and 2.[1] They were sentenced to concurrent terms

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[1]Fourteen defendants were indicted in a 16 count indictment for conspiracy to violate 18 U.S.C. 1952 (Count 1) and for substantive violations of 18 U.S.C. 1952, 1955, and 2 (Counts 2-16). Nine defendants went to trial. Three of these were severed during the trial. The jury acquitted the remaining six on the conspiracy count, acquitted two defendants on the substantive counts, and convicted the remaining four on the substantive counts. Of those four only petitioners appealed.

of three years' unsupervised probation and a $5,000 fine. The court of appeals affirmed (Pet. App. 1A-5A; 524 F.2d 123) and denied rehearing (Pet. App. 1B).

Petitioners' convictions arose out of the shipment of pinball machines that were to be used as gambling devices. These machines were shipped from the manufacturer (Bally Co.) in Chicago to the New Orleans Novelty Co. (Pet. App. 2A-3A). New Orleans Novelty in turn distributed them to petitioner Nims (and his firm, Lucky Coin Machine Co.) and petitioner LaGarde (and his firm, TAC Amusement Co.), who in turn contracted with various bars and restaurants for actual placement (*id.* at 3A). John Pierce testified that in a November 1967 meeting the customers, including petitioners, agreed to a policy of noninterference in a marketing system for the gambling devices and to a rotating system of payoffs to the local police (*id.* at 4A; as amended, *id.* at 1B).[2]

Petitioners contend that the indictment joined them improperly with other defendants, and that the district court consequently should have granted their motion for a severance. The foundation for this claim is petitioners' allegation that the conspiracy count was brought, in bad faith, for the purpose of permitting joinder. Because of this, they contend, it should have been dismissed and, without the conspiracy count (on which all defendants were acquitted), joinder would have been impermissible under Fed. R. Crim. P. 8(b). The court of appeals correctly concluded that the allegations of bad faith

[2]Pierce entered a plea of *nolo contendere* prior to trial.

"are totally unsupported by any evidence whatsoever and are frivolous" (Pet. App. 4A).[3]

It is settled that if a conspiracy count is properly submitted to the jury, the fact that the jury acquits on that count and convicts on the substantive violations does not affect the validity of the joinder. *Schaffer* v. *United States,* 362 U.S. 511. The evidence in this case would have allowed the jury to conclude that petitioners and other customers of New Orleans Novelty Co. had entered into an agreement of noninterference and a cooperative system of police payoffs. The conspiracy count therefore was properly presented to the jury, and the joinder of defendants was not erroneous.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1976.

[3]The fact that Pierce did not begin cooperating as a witness until after the indictment was returned is irrelevant. An indictment valid on its face cannot be attacked by an argument that the evidence before the grand jury was insufficient. *United States* v. *Calandra,* 414 U.S. 338; *Costello* v. *United States,* 350 U.S. 359.